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CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1934.

No. 32.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,

Petitioners,

vs.

ELLA E. PINKSTON,

Respondent.

REPLY BRIEF OF PETITIONERS.

THOS. STEVENSON,
Guarantee Title Bldg.,
Cleveland, Ohio,
Counsel for Petitioners.

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REPLY BRIEF OF PETITIONERS.

It is with reluctance we submit this short Reply Brief. We do so only because we feel it is our duty to the Court, as well as to the client, to see that the exact facts in the case are accurately presented. Even though it may well be that the sole issue in this case is one of jurisdictional amount, if the underlying facts are presented to the Court, they should be treated clearly, fully and accurately.

Opposing counsel have seen fit to emphasize the action of the Convention of the defendant Brotherhood with respect to the termination of the Widow's Pension Department, which is the basis of the Complaint herein. Unless reference is had to the Transcript of Record, however, the half statement in their Brief is completely misleading.

After quoting a recommendation of a Committee of the Brotherhood appearing at R. 82, counsel say on page 3 of their Brief, the following amendment to the report was proposed (R. 73):

> "That the International President and General Secretary and Treasurer be instructed *to make a lump sum settlement, not to exceed $1500.00 for each widow now on the Pension Roll. Widows that refuse to settle will have their names erased from the Pension Roll.*"

It is then stated the report as amended was adopted.

The instructions to the Brotherhood officers is emphasized in the Brief and the quotation ends with a period. Although the Brief states that the report as amended was adopted, it will be noted there is no statement that the quoted amendment was adopted but merely the statement that it was proposed. Standing alone, the foregoing would suggest that the Brotherhood undertook to compel each widow on the Pension Roll to settle for a sum not in excess of $1500.00 and, if any widow refused to so settle, her name would be erased from the Pension Roll and any and all payments to her would terminate. This is not even a fair statement of the facts.

The amendment proposed and adopted by the Convention appears in full at R. 83. It is as follows:

> "That the International President and General Secretary and Treasurer be instructed to make a lump sum settlement, not to exceed $1500.00 with each widow now on the Pension Roll. Widows that refuse to settle will have their names erased from the Pension Roll *and will be paid their monthly allowance* from the Benevolent Fund, providing these allowances must continue under the insurance laws of the States." (Italics ours.)

When this entire amendment is read, an entirely different picture is presented. The Brotherhood, in Convention, a meeting of locomotive firemen, was endeavoring to terminate what they had been advised was an improvident and unsound department. For this purpose they provided for settlements; that widows who refused to settle should have their names erased from the Pension Roll but, in the

same breath, made provision that they would be *paid their monthly benefits* from another fund, providing state insurance laws required it. Granting there may be a question as to the legal right of the Brotherhood to summarily terminate payment from one fund and insist on accepting payment from another fund, under the circumstances presented, no intention is here disclosed to compel the acceptance of an arbitrary settlement at the expense of losing all benefits.

In the action of the Convention with respect to erasing names from the Pension Roll there is not even a comma after that statement. In the same sentence provision is made for *continued payments*. True, the continued payments were under a proviso, but that was for later decision by the officers of the Brotherhood.

The record in this case shows that this proviso was considered by the officers. President Robertson, with ample authority to interpret the Constitution of the Brotherhood and acts of the Convention, testified as follows (R. 39):

> "A. I have counseled with my associates and have said to them that we will not undertake to distribute any of this fund, and that *in so far as the action of the convention is concerned,* we would first undertake to settle with these widows and if we could not settle with them, those that we could not settle with or were not willing to take the $1500, we would undertake to have the value of their annuities appraised and we would undertake to set aside, at least enough money to take care of them. I think that is what the convention contemplated, and I take that conclusion from the fact that an effort was made, as counsel for plaintiff has said, to interpose a motion that we should continue paying the $35 per month, but that motion, if carried, would have continued the widows' pension department itself, and that is the reason it was not adopted. The amendment that was finally adopted was a compromise of that action which provides for discon-

> tinuing the department, and on the other hand for making a settlement with those widows who were not willing to take $1500. That was a fireman's way of expressing it. In discussing it with counsel, I gave the best advice I could to my associates that we would settle with these widows before we would do anything else." (Italics ours.)

From the foregoing it is clear that, not only did the Convention provide for continuing monthly benefits, but the responsible officers of the Brotherhood testified that they would not undertake to distribute any of the fund until settlements had been made with all of the widows or other provision made to take care of their claims out of the particular fund and that such was the proper interpretation of the action of the Convention.

On page 4 of their Brief opposing counsel say that, in conference with officers of the defendant Brotherhood and its general counsel:

> "no mention was made of any alleged interpretation by the President of the Brotherhood in any way *modifying* the action of the Convention."

This is not challenged. No contention is made by the defendant that the President of the Brotherhood made any interpretation "modifying" any action of the Convention. An examination of his testimony on R. pages 38, 39, shows that he discussed the proviso with respect to the meaning of "insurance laws of the states" with counsel and then advised his associates that they would settle with the widows before they do anything else.

On page 11 of their Brief under the title, "QUESTION," opposing counsel state, "Her (Complainant's) individual interest in this fund is $4,650.00." In the first statement of their "Argument," on page 12, the same statement is repeated. It is difficult indeed to find a basis for

such a statement although it will perhaps be contended that such has been conceded by the defendants.

On page 7 of their Brief Respondents quote at some length from the Answer filed by the defendants. The present value of the fund on hand is given, also the average amount to meet these matured claims, $3,700.00. It is stated that settlements had been negotiated with 22 pensioners on a basis of $1500.00 each. It is then stated that "if" the 22 settlements are consummated there will be an average amount in the fund to meet each claim of about $4,650.00, and that the consummation of the 22 settlements would enhance the value of the fund about $100,000 and enhance the average amount on hand for the remaining claims about $950 each. These allegations in the Answer were obviously for the purpose of showing that the proposed settlements were not a detriment to the complainant but would work to her advantage in the event she should not remarry. That would be true of each widow who refused to accept the settlement.

Obviously, those allegations are merely to the effect that the *average amount on hand* to meet the matured claims was $3700.00; that "if" a certain group of 22 widows would make settlements for $1500.00 each the *average amount on hand* for the remaining matured claims would be $4650.00. This is neither a concession nor evidence that the complainant's actual interest was $4,650.00, or any amount.

Although respondent admits (Brief, page 2) that the promised pension of $35 per month is accompanied with the proviso "provided she did not remarry" a somewhat contradictory statement is made on page 14 of their brief. Counsel is arguing that the complainant's payments in this case are as "fixed" as this Court found the payments to be "fixed" in the *Thompson* case, 226 U. S. 551. Counsel then state:

> "She (complainant) has a vested right to continue to collect the $35.00 a month payments as long as she lives. *Nothing* can intervene to defeat this right, except the dissipation of the fund." (Italics ours.)

This statement must surely be a mistake as to the facts in the case at bar. It clearly appears that the payments provided for the Complainant continue only "provided she does not remarry." In the face of this proviso we suggest it cannot well be urged that Complainant is entitled to the payment as long as she lives and that nothing can defeat this right except the dissipation of the fund.

AMOUNT OF FUND AS TEST OF JURISDICTION.

Although the Circuit Court of Appeals squarely held in its Opinion that the matter in controversy is not the accumulated Pension Fund nor the combined claims of all holders of matured certificates, Respondent would apparently have this Court review that holding. Such holding is upon the authority of *Lyon Bonding Company v. Karatz,* 262 U. S. 77. In its decision in that case this Court referred with approval to the case of *Eberhard v. Northwestern Mutual Life Insur. Co.,* 241 Fed. 353.

Counsel seek to distinguish the case at bar from the *Eberhard* case upon the ground that, in the latter case, the defendant was a solvent insurance company, whereas in the case at bar, the allegation is that the society was insolvent. They overlook the fact, however, that in the *Lyon Bonding Company v. Karatz* case the insurance company was insolvent. Clearly the solvency or insolvency of the company has no bearing upon this question of jurisdiction.

An argument is made that, in the case of *Lyon Bonding Company v. Karatz,* where jurisdiction was denied, the Complainant was a simple contract creditor. Although the Complainant herein was the named beneficiary in a

matured Pension Certificate, which had been issued to her deceased husband, counsel say, Brief, page 24:

> "In the instant case neither Complainant nor the other beneficiaries have contracts enforceable at law."

We feel we cannot appear to acquiesce in that statement by silence. Under proper circumstances, the Complainant or any other holder of a similar matured Certificate could institute and maintain an action at law against the Brotherhood, for the recovery of benefits thereunder.

Respectfully submitted,

THOS. STEVENSON,

Attorney for Petitioners.